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No. 94-12

IN THE

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner

v.

STATE OF FLORIDA and
LAWTON CHILES, Governor,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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CONSTITUTIONAL PROVISIONS

Art. I, § 8, cl. 3, U.S. Const.:

> The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

STATEMENT OF THE CASE

This case arises under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166–68 (hereafter IGRA). IGRA establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. It is the result of years of legislative debate and prior judicial decisions. S.Rep. 100–446, 100th Cong., 1st Sess. 1–5, 1988 U.S.C.C.A.N. 3071–3076.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that, on reservation lands, the Indian tribes could engage in unregulated gambling activities if such gambling activities were not criminally prohibited by the State. Congress quickly passed IGRA in order "to provide for a statutory basis for the operation of gaming by Indian tribes," "to provide a statutory basis for the regulation of gaming by Indian tribes," and to create the National Indian Gaming Commission with authority to establish standards for gaming on Indian lands. 25 U.S.C. § 2702.

IGRA creates three classes of gambling. The issues before this Court relate to class III gambling, which includes all forms of gambling other than traditional Indian social games and bingo. 25 U.S.C. § 2703(8). Class III gambling is lawful only in a State which permits such gambling. 25 U.S.C. § 2710(d)(1)(B).

A Tribe desiring to conduct class III gambling must request the State in which the Indian lands are located to negotiate a Tribal-State compact governing such gambling. IGRA requires that "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate or fails to negotiate in good faith, IGRA provides that a Tribe can initiate a suit in federal district court [25 U.S.C. § 2710(d)(7)(A)(i)] to seek an order from the court forcing the State to the

negotiating table for the conclusion of a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii)

If the court finds that the State has not acted in good faith, then "the court shall order the State and the Indian tribe to conclude such a compact within a 60 day period." *Id.* If a compact is not completed within that time, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv) The mediator is required to select the one of the two submitted compacts which best comports with IGRA, other applicable federal law, and the findings and order of the court. *Id.*

The State and the Tribe then have 60 days to agree to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)–(vii) If the parties still cannot agree to execute a compact within that time, then the mediator transmits the selected compact to the Secretary of the Interior. At this point, the Secretary is empowered to prescribe regulations for the implementation of class III gambling consistent with the terms of the chosen compact, IGRA, and State law. 25 U.S.C. § 2710(d)(7)(B)(vii)

On January 29, 1991, the Seminole Tribe asked the State of Florida to commence negotiations pursuant to IGRA for a compact governing the Tribe's proposals for gambling on Tribal lands. [J.A. 21a] On March 4, 1991, the Tribe submitted a proposed compact providing for Tribal operation of poker, and machine or computer-assisted games which duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. [J.A. 24a–25a, 29a] By letter of May 24, 1991, the State agreed to discuss poker and other games allowed by § 849.085, Fla. Stat., but rejected all of the Tribe's other compact requests as being contrary to Florida law and not the proper subject of negotiation under IGRA. [J.A. 36a–39a] The letter set forth the State's preliminary legal position on the scope of

games believed by the State to be subject to compact negotiations and also contained suggestions for issues to be negotiated related to regulatory matters. On June 18, 1991, the Tribe submitted additional games that it asserted met the objections set forth in the May 24 letter from the State, and, at the same time, requested expansion of negotiations to include casino gambling. [J.A. 40a]

On August 22, 1991, representatives of the Tribe met with State representatives to discuss the Tribe's compact request. The State agreed to negotiate concerning poker and other card games, raffles, and parimutuel wagering on dog and horse racing and jai alai, all of which are permitted by Florida law. In response to questions from the State representatives, there was some discussion of how the Tribe would conduct these games if a compact were approved. The State, however, refused to negotiate any machine or computer-assisted gaming, which the State determined would violate §§ 849.15 and 849.16, Fla. Stat. Specifically, the State refused to negotiate a compact covering any form of casino gambling. [Joint Pretrial Stipulation at 4-5, ¶ 6, Pet. App. 45a]

On September 17, 1991, the State and the Tribe met to continue discussions. The State expressed its willingness to discuss a compact for games permitted under the interpretation of IGRA set forth in its September 13 letter. [Pet. App. 45a–46a] On September 19, 1991, the Tribe filed its complaint in the district court alleging that the State of Florida had failed to negotiate in good faith for the completion of a Tribal-State compact for gambling operations pursuant to IGRA. [J.A. 12a]

In its complaint, the Tribe requested an order directing the State to enter into a compact within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). In addition, the Tribe sought a declaratory judgment that the State permitted casino gambling and slot machines, thereby seeking to

make those types of gambling subject to negotiation under IGRA. [J.A. 18a–19a]

The State moved to dismiss the complaint based on the immunity afforded it by the Eleventh Amendment. [J.A. 49a] The district court issued its order denying the motion on June 18, 1992. *Seminole Tribe v. Florida*, 801 F.Supp. 655 (S.D. Fla. 1992) [Pet. App. 26a] An appeal to the Eleventh Circuit Court of Appeals ensued.

The Eleventh Circuit Court of Appeals reversed the district court's denial of Florida's motion to dismiss based on the State's Eleventh Amendment immunity, remanding with instructions to dismiss the case. The Court of Appeals held that the Eleventh Amendment immunity of the States could not be abrogated by Congress pursuant to its authority under the Indian Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and that none of the established exceptions to the State's Eleventh Amendment immunity, including *Ex parte Young*, were applicable. Therefore, the Court found that the federal courts lacked subject matter jurisdiction. *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994) [Pet. App. 1a]

During the pendency of the appeal in the *Seminole* case, the State of Florida and the Seminole Tribe agreed to proceed with cross-motions for summary judgment on the merits in the district court. After extensive briefing and oral argument, the district court issued an order and opinion defining the proper scope of negotiations for Florida and the Seminole Tribe. The court found that:

> IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form; and second that, contrary to the Tribe's argument, the State does not permit those specific types of Class III gaming activities which it now seeks to include in the

> Tribe-State compact negotiations. Having concluded that these proposed Class III activities need not be included in the compact negotiations, we hold that ***the State has not violated the IGRA's good faith requirement*** by refusing to include them in the negotiations

[Pet. App. 43a, 82a](emphasis added) This order is currently on appeal to the Eleventh Circuit Court of Appeals. That appeal has been abated during the pendency of the instant case.

JURISDICTIONAL NOTE

The *amicus* brief of the State and Local Legal Center raises a substantial jurisdictional question under Article III, contending that the role of federal courts under IGRA is "non-judicial" and that any order a federal court may enter against a State is unenforceable. If so, the Center's Article III argument and its jurisdictional concerns merit close attention.

The State views the provisions of IGRA as far more coercive. Indeed, the argument of the Seminole Tribe and its *amici,* and the ruling of several Courts of Appeal, lend great weight to its view. Here, for example, the federal district court construed the Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law and to specify what the State was required to negotiate. Further, there is nothing in IGRA that requires the Secretary of the Interior to accept the State's interpretation of its own laws. In fact, the Secretary would probably consider himself bound by a federal court's construction of State law, even if contrary to the State's interpretation.

SUMMARY OF THE ARGUMENT

The judgment of the Eleventh Circuit dismissing the Tribe's suit under IGRA against the State should be affirmed. Congress lacks the power under the Indian Commerce Clause to abrogate the Eleventh Amendment sovereign immunity of the States. Additionally, *Ex parte Young* does not apply to allow suit against the Governor for prospective relief in this case.

The Eleventh Amendment to the United States Constitution embodies the doctrine of sovereign immunity, limiting the grant of judicial authority set forth in Article III of the United States Constitution. The Eleventh Amendment prohibits the bringing of suit against a State in federal court absent the consent of the State. By its terms, the Amendment applies to "any suit in law or equity," and therefore applies regardless of the relief sought.

The State has not expressly consented to this suit nor can implied consent be found by this Court given the extremely limited circumstances under which implied consent can exit. Consent has been found in the "plan of the convention" for suits between sister States and by the United States against a State. Implicit consent in the "plan of the convention" has specifically been found not to exist between the States and Indian Tribes. *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991).

Consent to suit has also been based on certain provisions of the Constitution where this Court has found the power to abrogate the States' Eleventh Amendment immunity, such as § 5, Fourteenth Amendment. The Fourteenth Amendment allows federal intrusion into the executive, legislative, and judicial powers previously reserved to the States. This intrusion was ratified by the States, and effectuated by specific language in § 5 of the Amendment. The

conclusion that the States thus consented to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity where it is "necessary to enforce" the Amendment is understandable. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Consent to Congresses' power to abrogate has also recently been found in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), a plurality of this Court held that clause gives Congress the power to regulate the relations between States in order to foster free trade nationally. Viewed in light of the consent of the States to suit in the "plan of the convention" with respect to other States, and the unique aspects of the Interstate Commerce Clause in its restraint of the States, this Court concluded that such a consent to abrogate could be found in that Clause. But the power to abrogate is only available when the commerce power is incomplete without it and the abrogation is necessary to accomplish the goals of Congress under the Interstate Commerce Clause. Such is not the case here.

Petitioner's assertion that the Indian Commerce Clause also grants to Congress consent to abrogate the States' Eleventh Amendment sovereign immunity is without merit. The Indian and Interstate Commerce Clauses were treated as completely separate provisions in the constitutional convention. Consent found in the Interstate Commerce Clause is premised on a structural understanding of the relations between the States and the Federal Government. The powers granted under the Indian Commerce Clause are of a different character. The Indian Commerce Clause grants Congress complete authority over the Tribes, while the Interstate Commerce Clause grants Congress power to control the relations among the States within the ambit of that Clause. There is no basis to import consent to the power to abrogate under the Interstate Commerce Clause to cases involving the Indian Commerce Clause. *Cotton Petroleum v.*

New Mexico, 490 U.S. 163 (1989). It is not necessary for Congress to subject the States to suit under IGRA in order for Congress to achieve its purposes. Those purposes can be achieved under Congress' complete power over the Tribes; no State involvement is necessary.

If this Court concludes that it cannot distinguish the Interstate Commerce Clause from the Indian Commerce Clause or any other Article I power on a principled basis, then this Court's recent plurality decision finding abrogation under the Interstate Commerce Clause should be overruled. For if Congress has the power to abrogate the States' Eleventh Amendment sovereign immunity under any Article I power, then that immunity has been rendered a nullity.

Nor can the Tribe sue the Governor of Florida under the doctrine of *Ex parte Young*, 209 U.S. 123 (1907), in order to avoid the States' immunity. Although this is not an action for damages, under IGRA it can only be a suit against the State. When an action is one against the State, it is barred regardless of the relief sought.

The requested relief also seeks to compel the Governor to act in an area where he has discretion as to whether and how to act. *Ex parte Young* is therefore inapplicable. Moreover, in that the Tribe seeks a mandatory injunction, not the prohibition of unconstitutional conduct envisioned by *Young*, it asks for relief not available under *Young*.

IGRA utilizes State law to determine what types of class III gaming are permissible. The complaint in this case seeks a determination of State law and a mandatory injunction ordering the Governor to negotiate for the types of gambling set forth in the injunction. This suit, and IGRA to the extent it authorizes this suit, impinge on the State's discretion as to the appropriate interpretation of State law and the proper terms for negotiations. This is a serious intrusion on

the discretion of the State in the formulation of its public policy not warranted by the *Ex parte Young* doctrine. Although the Tribe asserts that the State can ignore the coercive orders of a federal court called for by IGRA, this assertion lacks merit. Ignoring a federal court order impugns the court's dignity and constitutes contempt.

To the extent IGRA's commands are mandatory and the orders of a federal court are mandatory, the State is faced with a choice of negotiating for the terms dictated by the Tribes or facing the coercive orders of the federal courts. IGRA thus treats the States as an administrative subdivision of the federal government in violation of the Tenth Amendment. *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992)

Contrary to a new assertion made by the Petitioner, *Hans* v. Louisiana, 134 U.S. 1 (1890), should not be overruled or limited. It has stood for over a century and has been the basis of many decisions of this Court and many laws passed by Congress. The States did not consent to suit in federal court by the Indian tribes in the "plan of the convention" and the States did not consent in the Indian Commerce Clause to Congress abrogating the States' immunity. The relationships of the States and the Tribes with respect to their sovereign immunity, confirmed four years ago in *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991), should be left alone.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT PERMIT A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR BASED ON THE ALLEGED FAILURE OF THE STATE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act provides that if a State refuses to negotiate or fails to negotiate in good faith with an Indian tribe for the conclusion of a gaming compact, then the Tribe may sue the State in federal court. 25 U.S.C. § 2710(d)(7)(A)(i) The Seminole Tribe brought suit against the State and its Governor alleging that Florida had failed to negotiate in good faith for the conclusion of a gaming compact. The district court denied a motion to dismiss based on the State's Eleventh Amendment immunity; the Eleventh Circuit Court of Appeals reversed holding that Congress lacked the power to abrogate the State's immunity pursuant to the Indian Commerce Clause and that no exceptions applied.

Prosecution of this suit violates the State's Eleventh Amendment sovereign immunity which bars suit against the State in federal court absent the States' consent, regardless of the relief sought. Congress lacks the authority under the Indian Commerce Clause to abrogate such immunity.

A. The Eleventh Amendment Embodies the Concept of Sovereign Immunity in its Entirety

Sovereign immunity is a common law doctrine which shields the sovereign from the coercive power of the courts. This immunity is absolute without the consent of the sovereign. *Employees of the Department of Public Health and Welfare v. Dept. of Public Health and Welfare, State of Missouri*, 411 U.S.279, 288 (1973). In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court found:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

Id. at 13 (quoting Alexander Hamilton, Federalist # 81). *See also, Monaco v. Mississippi*, 292 U.S. 313, 322-27 (1934). This immunity is absolute, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S.Ct. 684, 688 (1993).

In 1793, this Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793). This Court's decision, to hold Georgia liable upon certain bonds, "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *See, Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97–98 (1984). Although the Eleventh Amendment was adopted in direct response to the holding in *Chisolm*,

> this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.

Pennhurst, 465 U.S. at 98. Thus, in *Hans v. Louisiana*, 134 at 15, the Court found that "federal jurisdiction over suits

against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States."

The Eleventh Amendment embodies the broad and fundamental principles of sovereign immunity. *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 472, 486 (1987); *Green v.* Mansour, 474 U.S. 64, 68 (1985); *Atascadero State Hospital* v. Scanlon, 473 U.S. 234, 238 (1985). This limitation on the judicial power of the United States is a "compelling force," *Ford Motor Co. v. Indiana*, 323 U.S. 459, 467 (1945), extending to all suits regardless of the relief sought. *Puerto Rico*, 113 S.Ct. at 688. By its very terms the Amendment applies to "any suit in law or equity," a premise acknowledged in *Cory v. White*, 457 U.S. 85, 90 (1982):

> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the State treasury is sought. [footnote omitted] It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought.

See also, Pennhurst, 465 U.S. at 114 n.25 ("[T]here was no suggestion [in *Edelman*] that damages alone were thought to run against the State while injunctive relief did not" thereby barring damage claims but not injunctive claims.) This bar is necessary "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico*, 113 S.Ct. at 689. *See also, Fitts v. McGhee*, 172 U.S. 516, 527-28 (1899).

The Court has frequently recognized this broad intent:

> The fact that the motive for the adoption of the 11th Amendment was to quiet grave apprehensions that were extensively entertained with respect to

> the prosecution of state debts in the federal courts cannot be regarded...as restricting the scope of the amendment to suits to obtain money judgments. The terms of the amendment...were not so limited.

Missouri v. Fiske, 290 U.S. 18, 27 (1933). *Accord, Employees*, 411 U.S. at 292 (the Eleventh Amendment reversed the holding in *Chisolm* and more generally restored the original understanding of sovereign immunity.)

In *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994), this Court held that the Port Authority, a bistate compact clause entity, was not entitled to Eleventh Amendment immunity. Referring to the "impetus for the Eleventh Amendment," it acknowledged that jeopardy of the public fisc was the most salient factor. *Id.* at 404. However, the Court also recognized that this is not the only issue for Eleventh Amendment analysis, discussing the "twin reasons" for the passage of the Eleventh Amendment: 1) to protect the public fisc; and 2) to accord the States the respect owed them as members of the federation. *Id.* at 400. The Eleventh Amendment "emphasizes the integrity retained by each State." *Id. Accord*, *Fitts v. McGhee*, 172 U.S. at 528 (Eleventh Amendment's purpose was to prevent the indignity of subjecting the States to the coercive process of the federal courts.)

The Eleventh Amendment is a "fundamental protection" and is

> rooted in a recognition that the States, although a Union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation.

Puerto Rico, 113 S.Ct. at 688-89. No matter what relief is requested, suits against the State violate the fundamental value of sovereign immunity as embodied in the Eleventh Amendment and are barred, absent the consent of the sovereign State. Despite this overwhelmingly clear standard, the Petitioner and the Solicitor General argue that the Eleventh Amendment can be abrogated. Their logic fails because they cannot point to any consent in the "plan of the convention" which will support this power.

B. Florida has not Consented to this Suit

The Eleventh Amendment embodies the historical understanding of the immunity of a State as a sovereign entity. It stands for the

> presupposition of our constitutional structure...that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty. ...and that a State will therefore not be subject to suit in federal court *unless it has consented to suit,* either expressly or in the plan of the convention.

Blatchford v. Native Village of Noatak, ___ U.S. ___, 111 S.Ct. 2578, 2581 (1991) (emphasis added). Consent in this context can be express or implied, although implied waiver or consent "is not a doctrine commonly associated with surrender of constitutional rights." *Welch*, 483 U.S. at 473; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In this case, Petitioner has never claimed that the State of Florida expressly waived its immunity. Implied consent has previously been found by this Court only by virtue of: 1) an absolute consent in the "plan of the convention"; or 2) consent in that plan to allow Congress to abrogate the States' immunity. Neither of these doctrines of implied consent can

be applied to a suit by an Indian tribe against the State based on the Indian Commerce Clause. *Blatchford*, 111 S.Ct. at 2582-83.

1. *Plan of the Convention*

The States surrendered a limited quantum of their sovereignty and consented to two classes of lawsuits when the Constitution was adopted in 1789.

> States of the Union still possessing attributes of sovereignty shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-23 (quoting A. Hamilton, (Federalist # 81))

This Court has found two types of consent in the "plan of the convention." In order to ensure the permanence of the Union, suits by the United States against a State are permitted. *U.S. v. Texas*, 143 U.S. 621 (1892). The constitutional plan also requires that controversies between States be the subject of judicial settlement.

> The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan and to the United States as the sovereign which the Constitution creates.

Monaco, 292 U.S. at 328-30. *See also*, *Blatchford*, 111 S.Ct. at 2582. Art. III, § 2, U.S. Const., bolsters this finding of consent by specifically granting to the federal courts "judicial power" over "controversies to which the United States shall be a party" and "controversies between two or more

States." Of critical note, this "plan of the convention" consent does not extend to the Indian tribes.

> [I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83 (emphasis in original). Neither is there any indication of such a consent in Article III of the Constitution. In addition to the consent found in the "plan of the convention," the States have consented to a limited power in Congress unilaterally to abrogate the States' Eleventh Amendment sovereign immunity.

2. *Abrogation*

In this case, the Seminole Tribe argues that Congress, in the passage of IGRA, intended to and did abrogate the States' sovereign immunity pursuant to its authority under the Indian Commerce Clause, Art I, § 8, cl. 3, U.S. Const. Congress lacks such power.[1]

Petitioner's arguments ignore this Court's pronouncement that abrogation of the States' sovereign immunity places considerable strain on the concepts of federalism which inform the Eleventh Amendment and upsets the fundamental balance set by the Constitution. *Dellmuth v.*

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1 The court below determined that the IGRA was passed pursuant to the Indian Commerce Clause. [Pet App. 17a-18a] *Amici* for the Tribes argue that the Interstate Commerce Clause provided authority for this Act and therefore the Congress had authority to abrogate the States' sovereign immunity under *Pennsylvania v. Union Gas*. This issue is not properly raised by *amici*. *UPS v. Mitchel*, 451 U.S. 56, 60 n.2 (1981)

Muth, 491 U.S. 223, 227 (1989). In fact, the power to abrogate has been found by this Court in only two contexts: 1) § 5, Fourteenth Amendment; and 2) the Interstate Commerce Clause, Art. I, § 8, cl. 3. Neither applies or lends force to the Tribe's argument.

a. § 5, Fourteenth Amendment

The enactment of the Fourteenth Amendment sanctioned unprecedented intrusions into the legislative, executive, and judicial autonomy previously reserved to the states. *Fitzpa*trick v. Bitzer, 427 U.S. 445, 455 (1976). The prohibitions of the Fourteenth Amendment are directed to the States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amend. XIV, U.S. Const.

> [The Civil War Amendments] have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken.

Quern v. Jordan, 440 U.S. 332, 355 (1979) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)).

Section 5 of the Amendment states that, "The Congress shall have power to enforce by appropriate legislation the provisions of this article." Referring to that section, this Court has held:

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment,

> provide for suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick, 427 U.S. at 456. *Fitzpatrick* arose under the Civil Rights Act to remedy sex discrimination in the State's retirement benefits program. Title VII was passed pursuant to Congress' authority under the Fourteenth Amendment. *Id.* at 453 n.9. This Court held that Congress could authorize actions against the States for damages and attorneys' fees under that authority. *Id.* at 456–57.

The intrusion into the States' legislative, executive, and judicial authority, coupled with the explicit authority to adopt appropriate legislation, give solid ground to the implication that the States were granting to Congress the power to intrude further on their sovereignty by allowing for suit in federal court to enforce the terms of the Amendment. Neither the terms nor the history of the Indian Commerce Clause bear any resemblance to the Fourteenth Amendment in this respect. Terse in the extreme, the clause does not even hint at a surrender of sovereignty.

b. Interstate Commerce Clause

Although supported by a different foundation, this Court has also found the power to abrogate the States' Eleventh Amendment sovereign immunity in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), this Court held that Congress could abrogate the States' Eleventh Amendment sovereign immunity in its enactment of the "Superfund" Law pursuant to its powers under the Interstate Commerce Clause. *Id.* at 23 (plurality). The ruling was grounded on "the special nature of the power conferred by that Clause." *Id.* at 19. The Court stated that the interstate commerce power would be "incomplete without the authority to render States liable in damages" and

that Congress "found it necessary, in exercising this authority, to render [the States] liable." *Id.* at 19-20.

In context, this finding is understandable, even though Justice White, the fifth vote for the majority, concurred without explaining his reasoning. *Id.* at 57. The Interstate Commerce Clause is concerned with maintaining free trade among the states. *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989). Under the "dormant" commerce clause, the States are restrained in their actions with regard to each other in the absence of federal legislation. Under Congress' active powers, the aim is still to foster free trade among the States. This clause, both dormant and active, is unique among the Article I powers granted to the national government - it restrains the States and expressly allows regulation of the economic relationships among the States. If the States consented to suits by sister States in the "plan of the convention," then it is logical to contend that the States consented to Congress' power to subject them to suit under the power granted to police the relationships of the States to each other.

Both § 5, Fourteenth Amendment and the Interstate Commerce Clause grant powers to Congress which are addressed to the States. The Indian Commerce Clause, on the other hand, is a grant of power to Congress to control the affairs of the Indian tribes. The States did not submit to suits by Indian tribes in the "plan of the convention," and neither did the States consent to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity in the "plan of the convention" by reason of the adoption of the Indian Commerce Clause. No consent can be found to support the abrogation of the States' Eleventh Amendment immunity pursuant to the Indian Commerce Clause.

3. *The Indian Commerce Clause*

In order to overcome the States' sovereign immunity, the Court must find consent. Petitioner argues that the States have consented to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity pursuant to its power under the Indian Commerce Clause. This argument lacks merit.

> As Chief Justice Marshall observed in *Cherokee Nation v. Georgia*, 5 Pet. 1, 18, 8 L.Ed. 25 (1831): "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct."
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> * * *
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> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation,...the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.... The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.

Cotton Petroleum, 490 U.S. at 192 (citations omitted).

The Interstate Commerce Clause and the Indian Commerce Clause are wholly dissimilar and the latter provides no

principled basis whatsoever for finding that the States consented to suit by the Indian Tribes. *Blatchford*, 111 S.Ct. at 2583. The States cannot be presumed to have agreed to something indirectly which they clearly did not agree to directly, *i.e.*, consent to suit by tribes in derogation of the States' sovereign immunity. This distinction is consistent with the distinctions made by this Court in *Cotton Petroleum*. The implied consent found in *Union Gas* from the Interstate Commerce Clause is based on a structural understanding of the relationship of the state and federal governments, including the consent derived from the "plan of the convention." That understanding does not apply to the Indian Commerce Clause.

The Indian Commerce Clause gives Congress exclusive and plenary power *over the Indian tribes*. This power is *complete* — complete enough to allow for the elimination of a tribe as a legal entity.

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.

United States v. Wheeler, 435 U.S. 313, 323 (1978). *See, e.g.* Alabama and Coushatta Indians of Texas Termination Acts, 25 U.S.C. §§ 721–728.

Petitioner's historical analysis of the Indian Commerce Clause brings it only to this point — that the power of Congress over the Tribes is exclusive and complete with respect to the *Indian tribes*. It does not follow from that proposition that the power to abrogate the *States'* Eleventh Amendment sovereign immunity is even arguably found in the Indian Commerce Clause.

The Tribe's sovereignty is wholly dependent on the pleasure of Congress. States are not so dependent; they created

a Union premised upon their sovereignty remaining intact. As opposed to its complete power over the Indian tribes, Congress has only the limited powers granted to it by the Constitution to control the relations among the States. The right to abrogate Eleventh Amendment sovereign immunity is available to Congress under the Interstate Commerce Clause only if its power is "incomplete" and abrogation is "necessary" for the exercise of the commerce power. *Union Gas*, 491 U.S. at 19–20 Neither of these conditions is met with respect to IGRA and the Indian Commerce Clause.

Congress' power under the Indian Commerce Clause is complete. With regard to Indian affairs, there are no limitations on Congress' authority to pass legislation affecting the Tribes. Subjecting the States to suit is not necessary either to fulfill that power or to effectuate the stated purposes of IGRA. The purposes of IGRA include providing a statutory basis for the operation and regulation of Indian gambling. 25 U.S.C. § 2702 Inclusion of the States in the regulatory scheme was not necessary. IGRA could have been written to allow the Tribes to regulate themselves, to subject them to federal regulation, to allow ***voluntary*** participation of the States, or to allow for suit by the United States to enforce the terms of the Act. *See, Employees*, 411 U.S. at 285–86 (FLSA allows for suit by the Secretary of Labor.). None of these schemes would have required that the States be subject to suit by a Tribe in derogation of their Eleventh Amendment sovereign immunity. Contrary to the Tribe's assertion that the remedy crafted by Congress in IGRA is "consistent with the core values of the Eleventh Amendment," [Pet Br. at 21 n.5], that remedy ignores "the very object and purpose of the Eleventh Amendment [which] were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Fitts v. McGhee*, 172 U.S. at 527–28

IGRA's scheme plainly mandates State involvement in permitting casino gambling on tribal lands. The Tribe even interprets IGRA as allowing a federal court to decide that the Tribe is allowed to conduct casino gambling that the State believes is denied to all other citizens by State criminal law. Both fly in the face of the Tenth Amendment. As this Court observed in *New York v. United States*, 112 S.Ct. 2408, 2424 (1992):

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

The Tenth Amendment does not allow federal officials to avoid accountability in this manner. *Id.* Casino gambling remains politically unpopular in most States and has been defeated in Florida in three referenda in the past two decades. If Congress wishes to control casino gambling on reservations, it has the complete authority to do so and such a decision should be made "in full view of the public." *Id.*

4. Union Gas Should be Overruled

Congress chose to command the States to be involved in Indian gambling and created an enforcement remedy that can only be based on an extension of the plurality opinion of this Court in *Union Gas*. The differences between the Indian and Interstate Commerce Clauses militate strongly against extending that holding to this case. The Indian Commerce Clause provides no authority for Congress to abrogate the States' Eleventh Amendment sovereign immunity. On issues of constitutional law, the doctrine of *stare decisis* is not strictly followed. *Edelman*, 415 U.S. at 671 & n.14. *Stare decisis* is a "principle of policy" not an "inexorable

command." *Payne v. Tennesee*, 115 L.Ed.2d 720, 737 (1991). That is especially true in cases such as this where the issue is constitutional and "correction through legislative action is practically impossible." *Id.* Where a precedent is "unworkable or badly reasoned" the Court should not feel restrained. *Id.* This is the case with the plurality holding of *Union Gas*, a relatively recent, not widely relied upon holding. The divergent interpretations regarding the validity of the remedy found in IGRA is evidence of the difficulty of reconciling that opinion with the existing body of law. In contrast, this Court has refused to overturn *Hans* v. Louisi*ana,* a unanimous decision upon which a minimum of 17 decisions of this Court and innumerable acts of Congress rely. *Welch*, 483 U.S. at 494 n.27, 495–96 (Scalia concurring).

If this Court concludes that it cannot limit *Union Gas* to the uniqueness of the Interstate Commerce Clause, or if credence should be given to Petitioner's *amici's* argument that IGRA was adopted under the Interstate Commerce Clause, then *Union Gas* should be reconsidered and overruled. For a full discussion of this point, see Brief of *amicus,* States, which we adopt here by reference.

Union Gas held that the Interstate Commerce Clause's plenary authority to regulate commerce provides a basis for the power to abrogate. An expansive reading of this power would render the States' Eleventh Amendment sovereign immunity a nullity. All of Congress' power is plenary when read in conjunction with the Supremacy Clause. All of Congress' power is granted by the States with a concomitant reduction in the sovereign power of the States and all of Congress' powers are "carved out" of the States' power. *Fitzpatrick*, 427 U.S. at 456.

A broad reading of *Union Gas* that ignores the unique nature of the Interstate Commerce Clause renders all Article I powers unrestricted and available as a basis for

overruling the States' Eleventh Amendment sovereign immunity, leaving it without any force. Article I powers are not, however, unrestricted. For example, Congress can regulate the publishing industry under the Interstate Commerce Clause as that power is necessarily limited by the First Amendment. *See*, *New York* 112 S.Ct. at 2418 (analyzing limitations on Congress' power in a Tenth Amendment context.) Incidents of State sovereignty can be protected from Article I powers. In *New York*, it was the Tenth Amendment which did so; in this case the Eleventh Amendment protects the States' sovereign immunity, an incident of State sovereignty. *Cf. Id.*

In *Fitzpatrick*, this Court found that the Fourteenth Amendment, given its unique history and purpose, allowed suits that would be "constitutionally impermissible in other contexts." 427 U.S. at 456. If a broad reading of *Union Gas* is adopted, there would be no "other contexts" — Congress could subject the States to suit at its pleasure under any of its Article I powers. Arrogating such power to Congress renders the fundamental protection of the Eleventh Amendment a nullity and such a reading should be rejected.

The Indian Commerce Clause provides no basis upon which to find the power to abrogate the States' Eleventh Amendment sovereign immunity. There was no consent in the "plan of the convention" for direct suits by Indian tribes against States and, therefore, there was no consent in the "plan of the convention" to Congress' power to create such causes of action. This distinction controls this case and prevents the importation of the power to abrogate from the Interstate to the Indian Commerce Clause. The judgment of the Eleventh Circuit should be affirmed.

II.
THE SEMINOLE TRIBE CANNOT AVOID FLORIDA'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY SIMPLY BY INVOKING *EX PARTE YOUNG* AND NAMING THE GOVERNOR

The Tribe argues that even if Congress lacked the power to abrogate the States' Eleventh Amendment sovereign immunity under the Indian Commerce Clause, suit can be maintained against the Governor of Florida under the doctrine set forth in *Ex parte Young,* 209 U.S. 123 (1907). The Solicitor General joins in this contention.

The ruling in *Young* has not been given the expansive interpretation the Tribe and the Solicitor General suggest here. *See, Pennhurst*, 465 U.S. at 102. It is a narrow exception and "has no application in suits against the States and their agencies which are barred regardless of the relief sought." *Puerto Rico,* 113 S.Ct. at 688. *Ex parte Young* does not apply here because: A) this is in reality an action against the State; B) the acts sought to be mandated are discretionary, not ministerial; and C) there is neither an allegation of the existence of an unconstitutional State law nor a request to enjoin an unconstitutional action by a State officer.

A. This Suit is in Reality One Against the State

The doctrine in *Ex parte Young* is inapplicable if the suit is in reality one against the State. *Quern,* 440 U.S. at 345 n.17; *Cory*, 457 U.S. at 89. Under IGRA, the suit brought by the Petitioner is plainly one against the State. IGRA's commands are directed solely against the State and require the exercise of the State's legislative, compacting, and contracting powers, and further require that decisions be made

as to the application, *vel non*, of its criminal and civil authority. It is the *State* which must negotiate in good faith [25 U.S.C. § 2710(d)(3)(A)]; it is the *State* which must enter into compacts with the Tribes [25 U.S.C. § 2710(d)(1)(C)]; it is the *State* which may be sued [25 U.S.C. § 2710(d)(7)(A)(i)]; it is the *State* which will be ordered to complete a compact within 60 days [25 U.S.C. § 2710 (d)(7)(B)(iii)]; it is the *State* which will be ordered to submit its last best offer for a compact to a mediator [25 U.S.C. § 2710(d)(7)(B)(iv)].

In other analogous situations, this Court has steadfastly refused to adopt the position of the Tribe and the Solicitor General. In *Cory v. White*, a suit was brought under the Federal Interpleader Act by the executor of the estate of Howard Hughes to determine the domicile of the decedent for death tax purposes. The State officials who were sued raised the Eleventh Amendment as a defense and this Court specifically declined to narrow its reach, declining to hold that all suits for injunctions are permissible under *Young*. *Cory*, 457 U.S. at 91. Similarly, in *Worcester County Trust v. Riley*, 302 U.S. 292, 296 (1937), this Court stated:

> [A] suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids[.]

See also, Quern, 440 U.S. at 345 n.17 (quoting *Osborn v. Bank of U.S.*, 9 Wheat. (22 U.S.) 738 (1824)(key inquiry is whether the state officer is in fact the real party in interest or whether he is only a nominal party.)) *See also, Great Northern Life v. Read*, 322 U.S. 47, 51 (1944)(State cannot be controlled by courts through suits against officials.) This

Court has never ruled otherwise.[2] *See, Hawaii v. Gordon* 373 U.S. 57, 58 (1963) (The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter).

Even if the relief is not compensation, but the prevention or discontinuance of the wrong, the compulsion which the court is asked to impose may be against the sovereign although nominally directed against the individual. If so, the suit is barred. *Pennhurst*, 465 U.S. at 101 (relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). It is the essential nature and effect of the proceeding which determines whether it is a suit against the State. *Ford Motor Co.*, 323 U.S. at 464. The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would restrain the government from acting or *compel it to act. Dugan v. Rank*, 372 U.S. 609, 620 (1963)(emphasis added)(suit for injunction against officials of the United States actually against the sovereign).

In this case, the Tribe has attempted to avoid the State's Eleventh Amendment sovereign immunity by naming the Governor as the chief executive officer of the State. The

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2 In cases where damages were at issue, the Court seems to have developed a shorthand test — damage claims are barred as being against the sovereign. However, this must be considered a two tier test, because if the claim is for injunctive relief, the question of whether the claim is in reality one against the State remains. Were this not the case, then all of the language cited above addressing whether the case is really one against the State is merely superfluous; the only question that would need to be answered is the damages question. This Court has disavowed such an interpretation of *Edelman*. *Cory*, 457 U.S. at 90 n.2; *Pennhurst*, 465 U.S. at 114 n.25.

Court, in *Ex parte Young*, specifically disavowed such a subterfuge.[3]

> The things required to be done by the actual Defendants were the very things which, when done, would constitute a performance of the alleged contract by the state.

Id. at 151; *Quern*, 440 U.S. at 345 n.17 The same is true here. Any decree would be an order compelling the State to act, as the only "duties" imposed by IGRA fall upon the State. This not the type of injunction envisioned by *Young*. The injunction in *Young* sought to prevent a State Attorney General from doing "that which he had no legal right to do." *Ex parte Young*, 209 U.S. at 159. The mandatory injunction requested here seeks to order the Governor to do that which IGRA commands the *State* to do.

It is the effect of the relief sought which determines whether the suit is one against the state. In *Pennhurst*, 465 U.S. at 107-08, all of the relief ordered was institutional and official in character and relief under *Young* was denied. The same is true in the instant case. The relief requested is institutional in that it runs against the only party recognized by IGRA, the *State*; and it is official in that it seeks an order telling the Governor how to act in his official capacity as Governor. An order enjoining the Governor to take action under the dictates of IGRA would require of the Governor the very things IGRA commands of the State. Such a mandatory injunction would impermissibly compel the State to take action and interfere with the public administration. If the Tribe's argument were accepted, the

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3 "Where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made." *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123–24 (1828).

"narrow exception" set forth in *Young* would virtually eviscerate the Eleventh Amendment and any request for prospective injunctive relief would be permissible.

The Tribe asserts that the Governor is responsible for negotiating a compact with the Tribe. But the argument fails to distiguish the Governor from the State. Moreover, no citation to IGRA will support the Tribe's assertion. The only authority cited for this proposition is a provision of the Florida Constitution vesting executive authority in the Governor. [Pet. Br. at 23] But this provision does not vest him with authority to negotiate a compact. Compacting is traditionally a legislative act. Under the federal Compact Clause, interstate compacts are generally approved by the State legislatures and then by Congress. Similarly, other state compacts with Indian tribes are legislatively approved. *See, e.g.*, § 285.165, Fla. Stat. (Water Rights Compact between the Seminole Tribe and the State of Florida) If the legislature assumed the role of negotiator with the Tribes, the Legislature could not be sued under *Ex parte Young* because the Legislature is unquestionably "the State." This suit is, in reality, one against the State, seeking a mandatory injunction ordering the Governor to exercise his discretion in a certain way, and it is barred by the Eleventh Amendment.

B. The Acts Which are Mandated by IGRA Involve Discretion

Petitioner asserts that the acts sought to be enjoined are not discretionary and therefore are properly subject to the *Ex parte Young* exception. (Pet Br. 25–31) The Tribe asserts that only the requirement to negotiate in good faith is subject to the injunction and that the discretion as to the terms of the negotiation remains unaffected. Finally, the

Tribe asserts that the State can simply refuse to participate in the remedial actions ordered by the Court.

The complaint in this action shows that the Tribe was not merely seeking an order requiring the State to negotiate in good faith, but a declaration that certain games were to be the subject of negotiations based on the Tribe's assertion that those games were "permitted" in Florida. [J.A. 18a–19a] Any order from a court addressing this issue necessarily impinges on the discretion of the State to determine the extent of the negotiations *in accordance with State law.*

By limiting negotiations to gambling activities which are "permitted" by the State, IGRA relies upon State law in the implementation of the federal act. 25 U.S.C. § 2710(d)(1)(B). *See also*, 18 U.S.C. § 1166 (incorporating State law for federal enforcement purposes). In order to grant the Tribe's requested relief, a federal court must interpret State law and order the State to comply. That is prohibited.

> It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst, 465 U.S. at 106. By asking for an interpretation of what Florida "permits" under its own law, Petitioner requested just such an intrusion.

The Tribe's suggestion that the State can merely refuse to participate in the remedial process militates against its argument. If the State can refuse, then the very willingness to negotiate becomes a discretionary act. The Solicitor General even characterizes the "duty" to negotiate as a "conditional one." [Sol. Br. at 17] If so, then it is not a ministerial duty for which a mandatory injunction will lie. *Young*, 209 U.S. at 158. Petitioner cannot have it both ways;

either the State's participation is discretionary or it is not. If it is, then *Ex parte Young* does not apply no matter how its holding is interpreted.[4] If the States' participation is mandatory, then IGRA violates the Tenth Amendment.

The Eleventh Circuit did not address the Tenth Amendment issue because it had not been raised in the District Court. [Pet. App. 2a–3a at note 2] This Court's decision in *New York* v. *United States* had not been issued at the time of the filing of the complaint and motions in this case. Petitioner asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*. This Tenth Amendment question is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court. The Court may appropriately address the issue.

New York v. United States, 112 S.Ct. 2408 (1992), held that the "take title" provision of the Low-Level Radioactive Waste Policy Act of 1985 was a violation of the Tenth Amendment. This was based on a finding that, under the Act:

> A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

Id. at 2429. But, as the Court pointed out, Congress has authority over individuals, not the States. *Id.* at 2422. Hence, it can encourage, but not compel, a State to regulate in a particular way. For example, under the Spending Clause, Congress may condition the receipt of federal funds on compliance with certain dictates, *id.* at 2423, and thus highway funds may be conditioned on the adoption of a minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203,

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4 If the States' role is discretionary, then the Tribes have another jurisdictional problem — if the State has no duty, then the failure to act does not raise a case or controversy for Article III jurisdictional purposes.

206 (1987). Further, Congress can offer the States an alternative of regulating according to a federal standard or having State law preempted. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

Congress afforded the States neither of these alternatives in the passage of IGRA. The Act provides that the State "shall negotiate." 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate, or negotiate in good faith, then it will be subject to the coercive process of the federal courts. 25 U.S.C. § 2710(d)(7)(A)(i). The coercive elements of IGRA, requiring the States to negotiate under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the federal government. IGRA violates the Tenth Amendment when it puts the States in this position *New York*, 112 S.Ct. at 2434.

Petitioner asserts that the State can simply refuse to participate. (Pet Br. at 26 n.9) But that course risks a finding of contempt and undermines the dignity of the federal courts. IGRA empowers a federal court to ***order*** the parties to conclude a compact within 60 days and then to ***order*** the parties to submit a "last best offer" to a mediator.[5] 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv). Failing that, the Secretary of the Interior is empowered to impose regulations governing the conduct of class III gambling, presumably making ***his*** interpretation of State law the final word. 25 U.S.C. § 2710(d)(7)(B)(vii). Moreover, there is no limitation

5 In part V of the opinion of the Eleventh Circuit below [Pet. App. 24a–25a], the court creates a remedy for the Tribes which is not found in IGRA and which upsets the balance of the parties which was carefully crafted in the passage of IGRA. The court may not legislate; if IGRA's process is barred by the Eleventh Amendment, then it is up to Congress to rebalance the interests of the parties in the creation of a new statutory scheme. This issue is pending on a cross-petition for certiorari in this Court, docket number 94-219.

on his authority to include duties for the State in his proposed regulations.

By subjecting the States to the choice of negotiating and entering into a compact or being subject to the coercive orders of the District Court, IGRA violates the Tenth Amendment. The relief sought under IGRA against the Governor directs him in the exercise of his discretion; no such relief is available under *Ex parte Young* absent an allegation of an unconstitutional State law or an unconstitutional action by State officers.

C. There is no allegation of an unconstitutional State law or an unconstitutional action by State officers

In *Ex parte Young*, the Attorney General of Minnesota was enjoined from enforcing an unconstitutional state law. This Court held that the unconstitutional state law was void and therefore could not impart to the responsible official the immunity of the State. *Id.* at 159-60. In this case, there is no allegation that the actions of the Governor are in furtherance of an unconstitutional law. Nor is there an allegation that his conduct violates the Constitution. Therefore, the rationale of *Young* is inapplicable. This Court found *Ex parte Young* similarly inapplicable in *Worcester County Trust v. Riley:*

> the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it.

302 U.S. at 300; *Mansour*, 474 U.S. at 68 (*Ex parte Young* exception applies to "a suit challenging the constitutionality of a state official's action in enforcing [a] state law"); *Employees*, 411 U.S. at 294 n.9 (suits may be brought in federal court against state officers allegedly acting unconstitutionally).

In *Ex parte Young* the Court held that where "the act which the state attorney general seeks to enforce be a violation of the federal constitution" then he will be stripped of the State's immunity in recognition of the "superior authority of that Constitution." *Id.* at 160-61; *Pennhurst*, 465 U.S. at 104. This is an obvious reference to the Supremacy Clause which prevents the States from enacting laws in conflict with federal enactments. *See, Mansour,* 474 U.S. at 68 ("Relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.") When a State enactment conflicts with a federal law, it is unconstitutional under the Supremacy Clause and an injunction under *Young* would be available to prevent enforcement of the State law. Without an unconstitutional State law or rule, there is no basis for an injunction. *Compare, e.g., Edelman*, 415 U.S. at 653 (allegation that Edelman, the Director of the Cook County Department of Public Aid, administered the federal AABD program pursuant to the Illinois Public Aid Code, which conflicted with the federal regulations prescribing time standards for processing applications. This conflict rendered the code unconstitutional.) The lack of an allegation of the unconstitutionality of either a State law or the action of a State officer renders the doctrine of *Ex parte Young* inapplicable.

III.
A TRIBAL EXCEPTION TO *HANS v. LOUISIANA* SHOULD NOT BE ALLOWED

Petitioner argues that the holding in *Hans v. Louisiana* should be limited so as not to be applicable to suits by Tribes against States. In *Hans*, this Court held that the Eleventh Amendment prohibited suits against a State by citizens of that State even though the text of the Amendment did not literally state it. This holding was a confirmation of the sovereign immunity which the States retained upon creation of the Union. *Pennhurst,* 465 U.S. at 98.

The Tribe's argument would subject the States to suits by the Tribes on the same footing as suits by other States or the United States and require overruling this Court's holding in *Blatchford*. The only basis for suits by other States or the United States is the consent found in the "plan of the convention." This Court previously held that the States did not give such consent with regard to the Indian tribes. *Blatchford*, 111 S.Ct. at 2582–83.

In making this argument, Petitioner relies on language found in the Constitution's preamble. (Pet. Br. 33) This argument again is a "plan of the convention" argument which has been rejected by this Court. The States did not accede to Congress' power to abrogate their sovereign immunity in favor of the Tribes, any more than they consented to suits by the Tribes in the "plan of the convention."

The Petitioner's argument that a clear statement of intent to abrogate the States' immunity suffices to avoid the application of *Hans* is without merit. Congress cannot arrogate power to itself by simply stating its intent in bold clear language. In *New York v. United States*, 112 S. Ct. 2408 (1992), this Court found that Congress had similarly attempted to subject the States to an unconstitutional requirement in the

"take title" provision of the Low-Level Radioactive Waste Policy Act. That clear statement of intent did nothing to overcome the violation of the Tenth Amendment found there.

Petitioner alludes to various policy considerations which it believes justify limiting *Hans*. However, in *Pennhurst*, this Court said:

> [C]onsiderations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state.

465 U.S. at 123. Similarly, policy considerations suggested by the Tribe cannot override the fundamental limitation on the power of Congress or the judiciary embodied in the States' Eleventh Amendment sovereign immunity.

Finally, it is unnecessary and unwise at this time to add another layer of complexity to the analysis of the States' Eleventh Amendment sovereign immunity by creating an exception to *Hans*. The power to abrogate is not necessary for Congress to fulfill its duties and responsibilities under the Indian Commerce Clause. And, contrary to Petitioner's false plea, [Pet. Br. at 32] there is *no* State misconduct here in need of correction. If Congress wants to authorize virtually unrestricted gambling, it should take the responsibility for doing so. In sum, then, the relationship between the States and the Tribes is best left alone, both entities maintaining their traditional sovereign immunity. One hundred and four years of adherence to *Hans* should not be abandoned.

CONCLUSION

The Eleventh Amendment immunity of the States cannot be abrogated by Congress pursuant to its power under the Indian Commerce Clause, and the doctrine of *Ex parte Young* does not provide a way around that immunity in this case. Therefore, the questions presented by the Petitioner should both be answered in the NEGATIVE, and the holding of the 11th Circuit should be AFFIRMED, pending resolution of the cross-petition of the State of Florida, docket number 94-219.

Respectfully submitted,

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